

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Bandstra, C.J., and Fitzgerald and Gage, JJ.

PEOPLE OF THE STATE OF MICHIGAN)	SUPREME COURT
)	NO. 121189
Plaintiff-Appellant,)	
)	COURT OF APPEALS
v)	NO. 225855
)	
THOMAS DAVID CRESS,)	CALHOUN COUNTY
)	NO. 84-2098 FC
Defendant-Appellee.)	
)	

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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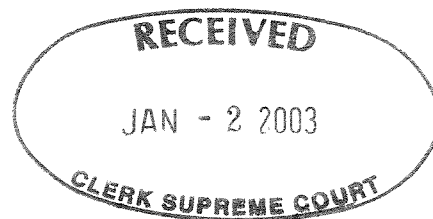


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2 Gillespie, *Michigan Criminal Law & Procedure* 14
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STATEMENT OF APPELLATE JURISDICTION

Jurisdiction for the Supreme Court to hear this appeal is conferred by MCL 770.3(6), 770.12; MCR 7.301(A)(2) and MCR 7.302(F)(3). Plaintiff-Appellant ("Plaintiff") appeals from the published Court of Appeals' decision, People v Cress, 250 Mich App 110; 645 NW2d 669 (2002), which was decided February 26, 2002 and released for publication on May 31, 2002.

The Supreme Court granted leave on October 23, 2002.

STATEMENT OF QUESTION INVOLVED

I

**WHETHER THE TRIAL COURT PROPERLY DENIED
DEFENDANT'S MOTION FOR NEW TRIAL BASED ON
NEWLY-DISCOVERED EVIDENCE OF ANOTHER'S
CONFESSION TO THE CRIME, BECAUSE:
(2) POLYGRAPH EVIDENCE LACKED FOUNDATIONAL
FACTS DEMONSTRATING THE RESULTS WERE
RELEVANT AND TRUSTWORTHY AND (2) THE
CONFESSION WAS FALSE?**

Defendant-Appellee Would Contend: "NO"

Amicus Curiae Answers: "YES"

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Prosecuting Attorneys Association of Michigan, Amicus Curiae, joins in the statement of facts of the Plaintiff-Appellant, People of the State of Michigan.

ARGUMENT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE OF ANOTHER'S CONFESSION TO THE CRIME, BECAUSE: (1) POLYGRAPH EVIDENCE LACKED FOUNDATIONAL FACTS DEMONSTRATING THE RESULTS WERE RELEVANT AND TRUSTWORTHY AND (2) THE CONFESSION WAS FALSE.

Plaintiff-Appellant appealed from the Court of Appeals' decision, People v Thomas David Cress, 250 Mich App 110; 645 NW2d 669 (2002), which reversed Defendant's first-degree murder conviction and remanded for a new trial. The Court of Appeals held the trial court "committed an error of law" by failing to consider Michael Ronning's polygraph test results, as relevant to the truthfulness of his confession. 250 Mich App at 136-137. The Court also held the trial court abused its discretion when deciding Michael Ronning's confession was false and that his confession would not make a different result probable if the murder case were retried. 250 Mich App at 135, 144-145.

A

POLYGRAPH TEST RESULTS ARE UNTRUSTWORTHY AND IRRELEVANT

Amicus respectfully asserts the Court of Appeals erred in requiring the trial court to consider untrustworthy and irrelevant polygraph evidence.

STANDARD OF REVIEW

In People v Barbara, 400 Mich 352, 364; 255 NW2d 172 (1977), this Court held that results of a polygraph examination are *not* admissible at trial. The polygraph technique had not received the degree of acceptance or standardization among scientists that would allow for its

admissibility. 400 Mich at 359. The Court decided, however, that a trial court *may* in its discretion use polygraph results and testimony offered by a defendant to decide a post-conviction motion for new trial. 400 Mich at 359, 411-414.

The Barbara opinion explained that, before a trial judge considered the results of a polygraph examination in a post-conviction hearing on a motion for new trial, certain conditions must be met. These conditions were:

- (1) The results of the polygraph tests are offered on behalf of the defendant.
- (2) The polygraph test was taken voluntarily.
- (3) The professional qualifications of the polygraph examiner are approved.
- (4) The quality of the polygraph equipment is approved.
- (5) The procedures employed are approved.
- (6) Either the prosecutor or the court may ask the subject of the polygraph examination to be examined by a polygraph operator of the court's choice or such operator may be asked to review the offered data with the original operator, or both.
- (7) The test results shall be considered only with regard to the general credibility of the examinee not as to the truth or falsehood of any particular statement.
- (8) The affidavits or testimony of the polygraph operator shall be a separate record and shall not be used in any way at any subsequent trial.
- (9) A judge granting a new trial on the basis of polygraph tests shall not thereafter act as a trier of fact in that case but may preside with a jury. A substitute judge as trier of fact shall not be privy to the polygraph examination or results, or to the fact that a polygraph examination was taken or was in any way involved. (400 Mich at 412-413)

As Barbara explained, post-conviction hearings were handled differently from trial proceedings. The hearings could be argued simply on the basis of affidavits. 400 Mich at 411. Inadmissible evidence could be considered. 400 Mich at 414.

IF THE BARBARA CASE APPLIED, DEFENDANT DID NOT SATISFY ITS CONDITIONS

In 1977, this Court decided that the polygraph could be used, for very limited purposes, in order to establish a “track record” to determine its potential and usefulness. Barbara, 400 Mich at 413. The Court was willing to support this experimentation in the context of post-conviction hearings, but nonetheless articulated “safeguards” that must be met. 400 Mich at 415-416. The record must include evidence about the validity of the polygraph machine, the test and testing condition, and the competence of the operator. Id. The judge must be satisfied with the reliability and proficiency of the polygraph machine and the polygraph operator. The judge must review the results of the test, if a proper foundation for the results has been laid. 400 Mich at 416.

Based on the record in the instant case, the trial judge did not err "as a matter of law" by not considering Michael Ronning's polygraph test results. A proper foundation for the polygraph results had not been laid. Ronning submitted to the polygraph examination under the protection of an attorney-client privilege. Both Plaintiff and Defendant were prevented from fully exploring the circumstances surrounding Ronning's polygraph examination and his statements during the polygraph. In addition, Ronning's polygraph test results were apparently never formally offered as an exhibit during post-conviction hearings. Consequently, the trial judge was never confronted with any substantive evidence, i.e., Ronning's polygraph test results.

In Barbara, this Court plainly required that a "proper foundation" had to be laid before a trial judge was required to decide whether to admit polygraph test results. The qualifications of the polygraph examiner, the quality of the polygraph equipment, and the procedures employed must be made a part of the record. The polygraph operator must provide testimony or an affidavit. 400 Mich at 412-413. In the instant case, an inadequate foundation was apparently

offered. Defendant failed to meet the conditions set forth in Barbara. The judge was under no duty to independently investigate the professional qualifications of the polygraph examiner or the quality of the polygraph equipment used. Absent an adequate foundation for the polygraph test results, the trial judge did not abuse his discretion by denying Defendant's Motion For New Trial without considering Ronning's polygraph test.

POLYGRAPH TEST RESULTS ARE UNTRUSTWORTHY

The trial judge did not commit "an error of law" when he did not consider Ronning's polygraph test results. Polygraph test results are inherently untrustworthy and, in Defendant's case, Ronning's polygraph results were especially untrustworthy. Ronning had a criminal history. His statements during the polygraph examination were also protected by "attorney-client" privilege and were, therefore, not subjected to close examination or review. He did not have an adverse interest at stake when he was polygraphed. See United States v Sherlin, 67 F3d 1208, 1216-1217 (CA 6, 1995) and Conti v Commissioner, 39 F3d 658, 662-663 (CA 6, 1994). These facts alone raise serious questions about the reliability of his polygraph test results.

Polygraph test results are not admissible in evidence for good reasons. In People v Becker, 300 Mich 562, 565-566; 2 NW2d 503 (1942) and People v Davis, 343 Mich 348, 370-372; 72 NW2d 269 (1955), this Court ruled that polygraph tests are not admissible in criminal trials because there is no general scientific recognition of the validity of these tests. Moreover, the trier of fact may give disproportionate weight to the results. People v Ray, 431 Mich 260; 430 NW2d 626 (1988). The United States Supreme Court expressed the same concerns in 1998 in

United States v Scheffer, 523 US 303; 118 S Ct 1261; 140 L Ed2d 413 (1998).

The Court in Scheffer analyzed polygraph evidence under the standards in Daubert v Merrell Dow Pharmaceuticals, 509 US 579; 113 S Ct 2786; 125 L Ed2d 469 (1993). (The Daubert standards superseded the stricter Frye¹ standard) The Court held that the polygraph had not attained sufficient scientific acceptability to produce evidence that is reliable. In fact, the scientific community "remains extremely polarized about the reliability of polygraph techniques." 140 L Ed 2d at 419. The Court also determined that Military Rule of Evidence 707 served a legitimate purpose by excluding polygraph evidence, because the evidence was unreliable. Eight justices agreed with the following statements:

State and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, e.g., Fed. Rule Evid. 702; Fed. Rule Evid. 802; Fed. Rule Evid. 901; see also Daubert v Merrell Dow Pharmaceuticals, Inc., 509 US 579, 589 (1993).

The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, *Modern Scientific Evidence* 565, n. 14-2.0, and 14-3.0 (1997); see also 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* 8-2(C), pp. 225-227 (2d ed. 1993) (hereinafter Giannelli & Imwinkelried); 1 J. Strong, *McCormick on Evidence* 206, p. 909 (4th ed. 1992) (hereinafter McCormick). Some studies have concluded that polygraph tests overall are accurate and reliable. See, e.g., S. Abrams, *The Complete Polygraph Handbook* 190-191 (1968) (reporting the overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess

¹ Frye v United States, 293 F 1013 (DC Cir, 1923).

truthfulness significantly less accurately—that scientific field studies suggest the accuracy rate of the “control question technique” polygraph is “little better than could be obtained by the toss of a coin,” that is, 50 percent. See Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in 1 Modern Scientific Evidence, supra, 14-5.3, p. 629 (hereinafter Iacono & Lykken). This lack of scientific consensus is reflected in the disagreement among state and federal courts concerning both the admissibility and the reliability of polygraph evidence. (Emphasis supplied)

In 1998, the United States Supreme Court basically came to the same conclusion that three justices of the Michigan Supreme Court reached in 1977, in Barbara: Polygraph analysis has not been accepted as reliable by the scientific community.

The United States Supreme Court recognized that the reliability of polygraph technology is threatened by various countermeasures, including the examinee’s ability to “fool” the polygraph machine and the examiner. 140 L Ed 2d at 420 n 6. These countermeasures were also considered in the Barbara case. 400 Mich at 400 n 30. The Barbara case allowed the trial court to decide whether to consider polygraph examination evidence at all. 400 Mich at 359, 412. The Scheffer case recognized the importance of the jury or judge in making independent determinations of credibility. 140 L Ed 2d at 421-422. The Barbara case addressed that issue too. 400 Mich at 404 n 36. In Barbara, this Court noted that the test results should be considered only with regard to the general credibility of the examinee, not as to the truth or falsity of any particular statement. 400 Mich at 413.

In Scheffer, the Court cautioned that the introduction of polygraph evidence in a trial would produce prolonged, collateral litigation about the appropriateness of the test, the qualifications of the polygraph examiner, the proper interpretation of the responses, and whether countermeasures distorted the examination results. Polygraph evidence lacks scientific reliability

because, as a whole, this technology has not received general acceptance in the scientific community. King v Trippett, 192 F3d 517, 522-523 (CA 6, 1999), (where petitioner failed to establish his rights were violated by the court's evidentiary rulings regarding a witness' failed polygraph test). There are no validation processes or validation data regarding polygraph results. Peer review regarding the polygraph procedures and technology is also missing. There are also legitimate challenges to be made to the underlying principles of the polygraph and the polygraphers' proficiencies. These "experts" are not disinterested witnesses. Keeping all these factors in mind, it is no wonder that prolonged, collateral litigation would occur.

As pointed out in People v Friday, 98 Mich App 522, 527-528; 296 NW2d 618 (1980), the reliability of polygraph test results diminish when the subject tested has an extensive criminal background. This consideration disabled Ronning's test results. It is believed that Ronning had an extensive criminal background that made his polygraph test results highly suspect. Even if this Court eventually concludes that Defendant did satisfy the Barbara conditions, Ronning's criminal background cannot be ignored. All things considered, his polygraph examination results are questionable.

The trial judge's decision to completely disregard Ronning's polygraph test results was supported by the current state of the law regarding polygraph evidence.² That decision was not "an error of law." The Barbara case should be overruled because it requires a trial judge to

² Polygraph test results are viewed with great skepticism because the results are inherently unreliable. See United States v Thomas, 167 F3d 299, 308 (CA 6, 1999), United States v Scheffer, 523 US 303; 118 S Ct 1261; 140 L Ed 2d 413 (1998) and United States v Ortega, 270 F3d 540 (CA 8, 2001).

consider untrustworthy, irrelevant polygraph evidence in a post-conviction motion.³

THE BARBARA CASE DID NOT SURVIVE ADOPTION OF THE MICHIGAN RULES OF EVIDENCE

The Supreme Court decided the Barbara case in 1977. About a year later, the Court adopted the Michigan Rules of Evidence. Those rules apply to every court. MRE 101. Many of the rules codified existing case law, but if a rule of evidence departed from previous common law, the rule prevailed. People v Kreiner, 415 Mich 372, 378; 329 NW2d 716 (1982).

The judicially-created "polygraph test" exception to the hearsay rule (discussed in the Barbara case) was not included in the evidence rules. One may reasonably presume, then, that it was abrogated *sub silentio*.

MRE 1101(a) explains that the Rules of Evidence are applicable to all actions and proceedings except those listed in MRE 1101(b). Motions for new trial are not listed in MRE 1101(b). In 1978 a motion for new trial was changed from an informal proceeding to a formal one. Consequently, the discretionary process allowing consideration of polygraph results (as discussed in the Barbara case) no longer applies to motions for new trial. The change in the evidentiary requirements for motions for new trial, MCR 6.431(B), supports this conclusion. Hence, polygraph test results should now be deemed inadmissible in *pre*-trial, trial and *post*-trial proceedings.

Polygraph test results are pure, simple, glaring hearsay. United States v Stromberg, 179 F Supp 278 (SD NY, 1959) In the instant case, Defendant was a "declarant" who attempted to

³ In the same vein, People v McKinney, 137 Mich App 110, 115-116; 357 NW2d 825 (1984) should be overruled to the extent it requires a trial judge to consider a defendant's polygraph examination in *pre*-trial proceedings.

admit his own out-of-court statements (denying he murdered the victim), “to prove the truth of the matter asserted.” MRE 801(c). He presented polygraph test results to argue the truthfulness of his own and Ronning's out-of-court statements. It was an approach that is contrary to the Barbara case. The polygraph should not be cast in a “decisive role.” 400 Mich at 414.

The admission of polygraph evidence was objectionable on several evidentiary grounds. First, polygraph evidence pertaining to Defendant was irrelevant because his credibility during the motion for new trial was not at issue. MRE 401, 402. Defendant's out-of-court statements were plainly hearsay. MRE 801, 802. His polygraph test, taken after his criminal trial, is not "newly-discovered" evidence but merely “newly-created” evidence. Ronning's out-of-court statements were also plainly hearsay. Polygraph test results are the polygraph operator's out-of-court statements. This evidence is unduly prejudicial and subject to exclusion under MRE 403. It is not sufficiently probative. See United States v Sherlin, 67 F3d 1208, 1216 (CA 6, 1995).

Secondly, MRE 702 prohibits polygraph evidence because such evidence is not derived from a scientifically-recognized field of expertise. MRE 702 discusses expert witnesses and the pre-requisites for expert testimony. The rule provides:

If the court determines that *recognized* scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Emphasis supplied)

The subject matter of an expert's testimony may be scientific or technical, in a recognized area of expertise. If testimony is elicited on the basis of a particular scientific technique or theory, that technique or theory must be sufficiently established to have gained general acceptance in its

field. This standard was first articulated in Frye v United States, 293 F 1013 (DC Cir 1923) and People v Davis, 343 Mich 348; 72 NW2d 269 (1955). It is the “Davis/Frye test.”

Michigan has a stricter evidentiary rule than the federal courts for determining the admissibility of novel scientific evidence. See People v Hubbard, 209 Mich App 234; 530 NW2d 130 (1995). MRE 702 requires “recognized scientific, technical, or other specialized knowledge,” before an expert witness may testify. Based upon the Becker, Davis, Barbara, and Scheffer cases, polygraph experts are not testifying about a recognized scientific technique. Consequently, the Michigan Rules of Evidence plainly prohibit the presentation of polygraph evidence in motions for new trial.

B

A FALSE CONFESSION

Amicus respectfully asserts the trial judge was in the best position to evaluate Ronning’s credibility, the falsity of his “confession,” and the conflicts between Ronning’s statements about the murder and other facts derived from the police investigation and the jury trial. The Court of Appeals applied an incorrect standard of review, reviewing the case *de novo* rather than for an abuse of discretion.

STANDARDS OF REVIEW

This Court reviews a trial court’s decision denying a defendant’s motion for new trial for an abuse of discretion. People v Lemmon, 456 Mich 625, 648, n 27; 576 NW2d 129 (1998), and People v Crear, 242 Mich App 158, 167; 618 NW2d 91 (2000). The Court examines the reasons

given by the trial judge, to determine if the lower court abused his discretion. People v Leonard, 224 Mich App 569, 580; 569 NW2d 663 (1997). Review of the trial court's factual findings are for clear error. MCR 2.613(C) and People v Crear, *supra*.

RONNING'S FALSE CONFESSION

A statute⁴ and a court rule⁵ speak to *when* a new trial should be granted. Case law explains *how* a trial court should evaluate a newly-discovered "confession". Before a trial court will grant a new trial because of newly-discovered evidence,

"(I)t must be shown that the evidence itself, not merely its materiality, was newly-discovered; that it is not cumulative; that it is such as to render a different result probable on a retrial of the cause; and that the party could not with reasonable diligence have discovered and produced it at trial." People v Clark, 363 Mich 643, 647; 110 NW2d 638, 640 (1961).

See also MCR 2.611(A)(1)(f); 2.612. A motion for new trial should not be granted on the ground of newly-discovered evidence unless it can be said, in light of the record, that the newly-discovered evidence would probably cause a different result to be reached on retrial. 2 Gillespie, *Michigan Criminal Law & Procedure* (2000 Revision) § 21:36, pp 144-145; People v Delgado, 5

⁴ A defendant is entitled to a new trial if legally cognizable reasons are presented. MCL 770.1 provides: "The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for *any cause for which by law a new trial may be granted*, or when it appears to the court that *justice has not been done*, and on the terms of conditions as the court directs." (Emphasis supplied)

⁵ MCR 6.431(B) provides: "(B) Reasons for Granting. On the defendant's motion, the court may order a new trial on *any ground that would support appellate reversal of the conviction* or because it believes that the *verdict has resulted in a miscarriage of justice*. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." (Emphasis supplied)

Cal 4th 312, 329; 851 P2d 811 (1993).

Trial judges are required to consider the admissibility of confessions outside the presence of the jury. MRE 104(c). Historically, trial judges have also been given the task of deciding whether a confession is false. Admittedly, a confession from someone other than the convicted defendant can be compelling. But those confessions are not cause for automatic reversal. Some confessions are proven false and without evidential support. A false confession (which does not coincide with established facts and is not convincing) will not warrant a new trial. People v Simon, 243 Mich 489, 494; 220 NW 678 (1928) and People v Czarnecki, 241 Mich 696, 699; 217 NW 781 (1928). If a trial court concludes there is sufficient evidence of the falsity of a confession and that testimony of the confessor would not make a different result probable, a motion for new trial should be denied. People v Mosden, 381 Mich 506, 512-513; 164 NW2d 26 (1969) and People v Sinclair, 21 Mich App 255, 259; 175 NW2d 893 (1970). The strength of the evidence supporting a defendant's conviction can be considered in deciding whether a different result would be probable. People v Higgenbotham, 21 Mich App 489, 493-494; 175 NW2d 557 (1970).

In the instant case, the trial judge did not find Ronning to be a credible witness. Ronning had a motive to lie, admitted he lied about the murders in Michigan, and had access to information from police reports, newspapers, and other sources about Patricia Rosansky's murder. Detective Mullen believed Ronning lied during Ronning's polygraph examination. Even more troublesome, Ronning asserted the 5th Amendment privilege during portions of his testimony in 1997, thereby preventing Plaintiff, Defendant, and the trial court from cross-examining him about the details of the crime and further testing his credibility.

Defendant should not be entitled to rely on "partial" testimony from Ronning, to support

his Motion for New Trial. In People v Giacalone, 399 Mich 642, 645; 250 NW2d 492 (1977), the Supreme Court stated that a lawyer may not knowingly offer inadmissible evidence or call a witness, knowing that he will claim a privilege not to testify. The validity of the privilege is not necessarily controlling. People v Gearns, 457 Mich 170, 182-183, 197; 577 NW2d 422 (1998), overruled on other grounds in People v Lukity, 460 Mich 484; 596 NW2d 607 (1999). Ronning is legally unavailable to testify at any retrial if he continues to invoke 5th Amendment privileges. People v Dyer, 425 Mich 572, 576; 390 NW2d 645 (1986).

Due to the nature of his testimony and invocation of his 5th Amendment rights, Ronning's integrity (and the trustworthiness of his statements) was questionable. He distorted the facts by selecting the topics he chose to speak about, but refusing to provide the details. Rogers v United States, 340 US 367, 371-374; 71 S Ct 438; 95 L Ed 2d 344 (1951), citing Foster v People, 18 Mich 266 (1869). A witness may not pick and choose what aspects of a particular subject to discuss, and then invoke the privilege against self-incrimination when questioned about the details. Mitchell v United States, 526 US 314, 321-322; 119 S Ct 1307, 1312; 143 L Ed 2d 424 (1999)

“NEW” EVIDENCE NOT LIKELY TO CAUSE DIFFERENT RESULT ON RETRIAL

The Court of Appeals should have considered how Ronning's “confession” would be treated at retrial. That analysis answers whether a different result is probable on retrial. People v Clark, *supra*. If Ronning continues to be unavailable to testify due to 5th Amendment privileges, his “statements against interest” would be evaluated for admissibility under MRE 804(b)(3).

That hearsay rule reads:

- (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant

against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.** (Emphasis supplied)

To admit a non-testifying declarant's statement, Defendant must overcome a presumption of unreliability as hearsay, MRE 804(b)(3). The burden of establishing a proper foundation rests with Defendant. People v Underwood, 184 Mich App 784, 787-788; 459 NW2d 106 (1990).

Consideration of the admission of a statement against penal interest presents four sub-issues: (1) Whether the declarant is unavailable, (2) whether the statement is against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be incriminating, and (4) whether a statement tending to expose the declarant to criminal liability and offered to exculpate the defendant is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. People v Schutte, 240 Mich App 713 n 2; 613 NW2d 370 (2000). The test for whether a witness is "unavailable" is explained in MRE 804(a). People v Bean, 457 Mich 677; 580 NW2d 390 (1998). It is one of reasonableness and depends on the facts and circumstances of each case. The "against interest" element requires that the statement be incriminating in a real and tangible way. People v Barrera, 451 Mich 261, 271; 547 NW2d 280 (1996).

With all that in mind, Ronning's "confession" would not automatically be admitted in Defendant's retrial. MRE 804(b)(3) establishes a high standard for admissibility based upon the corroborating circumstances that "clearly indicated the trustworthiness of the statement." Michigan has not recognized a declaration against interest as a "firmly rooted hearsay exception", and therefore, Defendant's evidence (Ronning's statements) must contain sufficient indicia of

reliability. People v Schutte, supra. There must be an assessment of the credibility of the declarant, and the trustworthiness of the statement. People v Barrera, supra. A hearsay statement is sufficiently trustworthy only if the factors surrounding its making demonstrate that the declarant was particularly likely to be telling the truth when he made the statement. People v Richardson, 204 Mich App 71, 75-77; 514 NW2d 503 (1994). Failure to establish trustworthiness of a statement, offered under MRE 804(b)(3), will result in the exclusion of that statement. People v Sanders, 163 Mich App 606, 610; 415 NW2d 218 (1987) and People v Spinks, 206 Mich App 488, 491-492; 522 NW2d 875 (1994).

In Barrera, this Court stated that the determination whether a statement is against a declarant's penal interest, when offered to exculpate a defendant, presents a question of law. To determine whether a statement is against penal interest, a court must decide if the statement would be important evidence against the declarant. The statement must shift liability away from the accused and toward the declarant. The court must determine if the declarant faced a reasonable threat of punishment. The trustworthiness of the statement must also be evaluated by the court, as well as the credibility of the declarant.

A statement may be excluded if the declarant's veracity is seriously doubtful or entirely lacking. 451 Mich 273-274. Citing People v Poole, 444 Mich 151; 506 NW2d 505 (1993), the Court in Barrera highlighted the favorable and unfavorable factors that must be considered, when determining the admissibility of a declarant's hearsay statement. 451 Mich 274-275. If a declarant has reason to curry favor/avenge, that would be a factor against the statement's admissibility. The same is true if the declarant had a motive or reason to lie.

Ronning's "confession" was not new evidence that would render an acquittal of Defendant

probable on retrial. People v Harris, 31 Mich App 100, 103; 187 NW2d 502 (1971). The trial court concluded Ronning was unworthy of belief. His statements were uncorroborated. People v Simon, 243 Mich at 494; People v Czarnecki, 241 Mich at 699. Ronning's credibility was evaluated in deciding the motion for new trial. People v Mechura, 205 Mich App 481, 484; 517 NW2d 797 (1994). Concepts in MRE 804(b)(3) are important in evaluating Ronning's "confession."

The trial court responsibly considered the testimony of the trial witnesses, trial evidence, and the credibility of Ronning and other witnesses at the motion for new trial. People v Nickopoulous, 26 Mich App 297, 299-300; 182 NW2d 83 (1970) and People v Canter, 197 Mich App 550; 197 NW2d 550 (1992). Based on Ronning's testimony, his out-of-court statements, his motivations and self-interest, and the inconsistencies with medical evidence and other facts documented about the murder, the trial court did not abuse its discretion by denying Defendant a new trial. United States v Pierce, 62 F3d 818 (CA 6, 1995) and United States v Barlow, 693 F2d 954, 966 (CA 6, 1982).

RELIEF

WHEREFORE, the Prosecuting Attorneys Association of Michigan, Amicus Curiae in support of Plaintiff-Appellant herein, respectfully request this Honorable Court reverse the Court of Appeals opinion in People v Cress, 250 Mich App 110; 645 NW2d 669 (2002), for the reasons stated herein.

Respectfully submitted,

DAVID L. MORSE

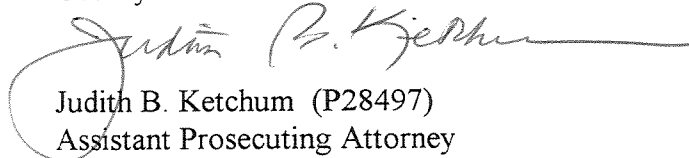
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